

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF DELAWARE
AND THE DELAWARE ENERGY OFFICE
THE OFFICE OF MANAGEMENT AND BUDGET
AND THE CONTROLLER GENERAL**

**IN THE MATTER OF INTEGRATED RESOURCE)
PLANNING FOR THE PROVISION OF STANDARD)
OFFER SERVICE BY DP&L POWER &)
LIGHT COMPANY UNDER 26 DEL. C. §1007(c) &)
(d): REVIEW AND APPROVAL OF THE REQUEST) **PSC DOCKET NO. 06-241**
FOR PROPOSALS FOR THE CONSTRUCTION OF)
NEW GENERATION RESOURCES UNDER)
26 DEL. C. §1007(d) (Opened July 25, 2006))**

**DELAWARE PUBLIC SERVICE COMMISSION STAFF
RESPONSE IN OPPOSITION TO CONECTIV ENERGY SUPPLY, INC.'S
PETITION FOR REHEARING AND RECONSIDERATION**

The Delaware Public Service Commission Staff ("Staff"), by and through Rate Counsel, hereby responds in opposition to Conectiv Energy Supply, Inc.'s ("CESI") Petition for Rehearing and Reconsideration ("the Petition") of the Final Findings, Opinion and Order No. 7199 issued on May 22, 2007 ("the Order"), by the Public Service Commission ("the Commission"), the Delaware Energy Office ("the Energy Office"), the Office of Management and Budget, and the Controller General (collectively "the State Agencies"), and in support thereof states:

BACKGROUND¹

1. Following six hours of open deliberations on May 8, 2007, the Commission decided by voice vote to accept Staff's recommendations regarding the generation bid proposals submitted pursuant to the Request for Proposals ("RFP") ("the Staff Report") with certain

¹ For a detailed discussion of the procedural history of this docket prior to the issuance of the State Agencies' decision regarding the long-term generation bid proposals, see pages 2-11 of Order No. 7199 (May 22, 2007).

modifications. On May 22, 2007, the Commission and representatives of the remaining three State Agencies, the latter of which had abstained from voting at the May 8, 2007 hearing, unanimously approved the Order affirming the Commission's May 8, 2007 voice vote. The Order accepted Staff's proposed energy supply portfolio and directed Delmarva Power & Light Company ("Delmarva") to negotiate in good faith with Bluewater Wind LLC ("Bluewater") for a long-term power purchase agreement ("PPA") for the provision of wind power. (Order No. 7199 (May 22, 2007) at ¶¶ 51, 55). The Order instructed Delmarva to negotiate independently with both CESI and NRG Energy, Inc. ("NRG") to provide any necessary backup firm power when wind power is not available and directed that the negotiations for the backup power be conducted at the same time as the Delmarva-Bluewater negotiations. (*Id.* at ¶ 56).

2. In accepting Staff's recommendations, the State Agencies explained at the outset that the Electric Utility Retail Customer Supply Act of 2006 ("the EURCSA") does not constrain the State Agencies to consider solely the original generation proposals submitted by the bidders. (*Id.* at ¶ 50). The State Agencies reasoned that the EURCSA did not contain such limiting language and that the RFP approved by the Commission and the Energy Office contemplated that negotiations between Delmarva and each bidder might modify the original submissions. (*Id.*) Moreover, the State Agencies reasoned that Staff's recommendation was the most appropriate method of diversifying risk, taking control of Delaware's energy future, and providing Delmarva's Standard Offer Service ("SOS") customers with price-stable reliable energy. (*Id.* at ¶¶ 50-52). Accordingly, the State Agencies found that Staff's proposal was not prohibited by the EURCSA.

3. The State Agencies recognized that their decision to direct Delmarva to negotiate with Bluewater for a wind PPA was not the "least cost" alternative, but reasoned that the

EURCSA criteria did not focus solely on price. (*Id.* at ¶ 53). Moreover, the State Agencies observed that price was not even specifically identified in the EURCSA as a Delaware generation evaluation factor. (*Id.* at ¶ 55). In light of the growing uncertainties with respect to price in the current energy market, the State Agencies based their decision on factors in addition to price such as environmental considerations and price stability. (*Id.* at ¶¶ 53-55). Despite the fact that CESI had submitted the lowest-priced bid, the State Agencies specifically declined to direct Delmarva to negotiate solely with CESI because “it does not utilize a new or innovative technology and it is not nearly as environmentally friendly as other proposed projects.” (*Id.* at ¶ 54).

4. Although the State Agencies rejected CESI’s proposed combined cycle gas turbine (“CCGT”) at its existing Hay Road site, they ordered Delmarva to negotiate with CESI and NRG for backup generation in Sussex County, Delaware. (*Id.* at ¶ 56). The State Agencies noted that NRG’s bid might have an advantage due to its pre-existing location in Sussex County, but did not preclude CESI from building a facility in southern Delaware or discussing the reliability of its existing Hay Road site with Delmarva. (*Id.*). In fact, the State Agencies observed that competition and flexibility were crucial components of the bidding process. (*Id.* at ¶¶ 55-56).

5. In its Petition, CESI urges the State Agencies to reconsider its CCGT proposal, terminate the current negotiations, and direct Delmarva to negotiate exclusively with CESI for its proposed CCGT at its Hay Road site. (Petition at ¶ 75(a)). Alternatively, CESI requests that the Stage Agencies direct Delmarva to consider CESI’s Hay Road site as an option for the backup component of the PPA and allow CESI and NRG to modify their proposals to include a wind component competitive with Bluewater. (*Id.* at ¶ 75(b)). First, CESI contends that the State

Agencies erred in directing Delmarva to negotiate with Bluewater for a long-term wind PPA because the Stage Agencies arbitrarily departed from the bid selection criteria established by the EURCSA. (*Id.* at ¶¶ 49, 56). CESI further alleges that this departure was not supported by substantial evidence in the record. (*Id.*) According to CESI, price is the controlling factor in the bid evaluation process. (*Id.* at ¶¶ 50-52). Furthermore, CESI asserts, the State Agencies erred in declining to follow the bid rankings provided by the Independent Consultant (“the IC”). (*Id.* at ¶¶ 55-56).

6. Second, CESI alleges that the State Agencies’ refusal to direct Delmarva to negotiate exclusively with CESI for backup generation at its Hay Road site was not supported by substantial evidence. (Petition at ¶ 70). Specifically, CESI contends that Staff’s discussions with PJM and the PowerWorld report regarding system reliability (“the PowerWorld Report”) were not subject to participant scrutiny, and thus, could not provide the basis for the State Agencies’ alleged rejection of CESI’s proposal. (*Id.* at ¶¶ 61, 68).

7. Finally, CESI asserts that the principles of flexibility and competition mandated by both the Order and the EURCSA require the State Agencies to delay the bidding process to allow NRG and CESI to include a wind generation component in their bid proposals. (*Id.* at ¶ 63).

ARGUMENT

I. STANDARD OF REVIEW

8. CESI argues that the State Agencies’ decision is subject to the “substantial evidence” evidence standard provided under Delaware’s Administrative Procedures Act (“the APA”), 29 *Del. C.* § 10142(d). (Petition at ¶¶ 42-43). Although the EURCSA does specifically provide for judicial review of final orders under the APA, the substantial evidence standard is

one of *judicial review*, and does not apply to a motion for reconsideration under Rule 34 of the Rules of Practice and Procedure of the Commission (“the Rules”). *See* 29 Del. C. § 10142(d) (“[t]he Court’s review...shall be limited to a determination of whether the agency’s decision was supported by substantial evidence on the record before the agency”) (emphasis added).

9. Rule 34 provides that any petition for rehearing and reconsideration must set forth the grounds for such petition that are *different from the arguments previously made to the Commission*. Commission Rule 34(b) (emphasis added). Although the Rules do not provide a specific standard of review for a Rule 34(b) motion, the standard employed by Delaware courts in considering a motion for reargument is illustrative. A motion for reargument will be denied “unless the Court has overlooked a controlling precedent or legal principles, or the Court has misapprehended the law or facts such as would have changed the outcome of the underlying decision.” *Dugan v. Delaware Harness Racing Comm’n*, 2006 WL 3026132, at *2 (Del. Super. Sept. 27, 2006). “A motion for reargument is not intended to rehash arguments already decided by the court.” *Id.*

10. CESI’s challenge to the State Agencies’ decision directing Delmarva to negotiate with Bluewater for a wind PPA “rehashes” the same arguments asserted by Delmarva and rejected by the State Agencies at the May 8, 2007 deliberations. At the May 8, 2007 deliberations, Delmarva argued that the hybrid energy portfolio violated the EURCSA because it “*ignores the bid evaluation results*, it ignores the RFP criterion, and proposes unevaluated results.” (5/8/2007 Tr. at 1650-51) (emphasis added). The Petition asserts these very same arguments, and does not contend that the State Agencies overlooked any controlling legal precedent or principles or that they misapprehended the law or facts. Thus, its Petition should be denied.

II. EVEN IF THE APPROPRIATE STANDARD FOR REVIEWING THIS PETITION IS SUBSTANTIAL EVIDENCE, THE STATE AGENCIES' DECISION TO DIRECT DELMARVA TO NEGOTIATE WITH BLUEWATER FOR A LONG-TERM WIND PPA WAS SUPPORTED BY SUBSTANTIAL EVIDENCE.

A. Price is Not the Decisive Factor in the Bid Evaluation Process

11. CESI argues that the State Agencies ignored price as the controlling factor of the EURCSA by not selecting its generation bid proposal, which throughout the bid evaluation process was consistently evaluated as the lowest cost bid. (Petition at ¶¶ 35, 49-50). In support of this contention, CESI alleges the EURCSA's delegation of responsibility to the State Agencies for evaluation and selection of one or more proposals that provide the "greatest long-term system benefits" in the "most cost effective manner" requires price to be the decisive factor in the bidding process. (*Id.* at ¶ 51).

12. CESI's position misconstrues the EURCSA. As CESI is well aware, the EURCSA was passed in response to soaring rate increases resulting from electric utility deregulation. (*See* Order at ¶ 1). As part of the planning process for Delaware's energy future, the EURCSA required Delmarva to file a RFP for long-term generation. 26 *Del. C.* § 1007(d). The General Assembly provided that "the Commission and Energy Office shall ensure that each RFP elicits and recognizes the value of:

- a. Proposals that utilize new or innovative baseload technologies;
- b. Proposals that provide long-term environmental benefits to the state;
- c. Proposals that have existing fuel and transmission infrastructure;
- d. Proposals that promote fuel diversity;
- e. Proposals that support or improve reliability; and
- f. Proposals that utilize existing brownfield or industrial sites."

26 Del. C. § 1007(d)(1). The EURCSA further required the Commission and the Energy Office to retain an independent consultant to oversee the development of the RFP and to *assist* the State Agencies in their evaluation of the proposals. 26 Del. C. § 1007(d)(2) (emphasis added).

Finally, the EURCSA conferred exclusive authority on the State Agencies to evaluate the bids and potentially select one or more proposals that “*result in the greatest long-term system benefits, including those identified in paragraph (1) of this subsection*, in the most cost-effective manner.” 26 Del. C. § 1007(d)(3) (emphasis added).²

13. Notably, none of the Section 1007(d)(1) factors references price, and nothing in the plain language of the EURCSA mandates that price be the *decisive* factor in the bidding process. (See Order at ¶¶ 20, 53-55; Staff Report at 51, 64-65). The EURCSA mandated that the PPAs provide generation with the “greatest long-term system benefits” and elicit the values of the six Section 1007(d)(1) factors “in the most cost effective manner” – *not* the cheapest price. See 26 Del. C. § 1007(d)(3).

14. CESI contends that prior orders in this docket hold that price is the controlling factor in the bidding process. (Petition at ¶¶ 8-18). They do not. Although price was not expressly identified as a bid evaluation factor in the EURCSA, the Commission and the Energy Office found that price was an important and appropriate factor in the evaluation process in light of the situation that led to the genesis of the EURCSA – high SOS rates. (Order No. 7066 (October 31, 2006) at ¶ 165). In rejecting some participants’ challenges to the importance of price as an evaluation factor, the Commission and Energy Office observed that the EURCSA

² While maintaining that price is the controlling factor under the EURCSA, CESI concedes that “the legislature directed the State Agencies to conduct a well-reasoned evaluation of all factors that results in the greatest long-term system benefits in the most cost-effective manner.” (Petition at ¶ 55).

contemplated price as an essential criterion. (Order No. 7106 (December 19, 2006) at ¶ 9).

However, the Commission and the Energy Office observed that the State Agencies were not bound by the results of a “straight addition of the numbers” in the IC’s point allocation and had the flexibility to “go outside the bare numbers” if they deemed it appropriate. (Order No. 7066 (October 31, 2006) at ¶ 115). This language appears in one of the very orders that CESI claims identifies price as the controlling evaluation criterion. Thus, these orders held that price is an essential factor for consideration – but certainly not the only factor, as CESI apparently contends. Accordingly, CESI’s contention that price is the decisive factor in the bid evaluation is wrong.

B. The State Agencies’ Decision to Deviate from the IC’s Rankings Was Supported by Substantial Evidence

15. CESI argues that the State Agencies ignored the IC’s rankings in approving the hybrid approach that was purportedly inconsistent with the EURCSA. (Petition at ¶¶ 40, 55-56).³ But, the contention that State Agencies are bound by the rankings of the IC inserts into the EURCSA language that is not there. The EURCSA and the State Agencies’ prior orders do not require the State Agencies to follow the IC’s recommendation. Rather, the statute simply mandates that the State Agencies retain an independent consultant to “assist” in the evaluation. 26 *Del. C.* § 1007(d)(2).

16. The EURCSA confers the authority to evaluate the generation proposals on the State Agencies – *not* the bidders, Delmarva, the public, or the IC. *See* 26 *Del. C.* § 1007(d)(3) (“[t]he Commission, the Director of the Office of Management and Budget, the Controller

³ CESI’s selective quotation of the IC’s April 4, 2007 Interim Report (“the Interim Report”) is misleading. Although the IC ranked CESI’s bid highest, the IC did not recommend that the State Agencies direct Delmarva to negotiate for its proposed CCGT at Hay Road. (Order at ¶ 15; Staff Report at 26; Interim Report at 3-4). CESI essentially urges the State Agencies to follow the IC’s point allocation but not its recommended course of action.

General and the Energy Office shall...evaluate such proposals...”). Furthermore, the EURCSA did not require the State Agencies to blindly follow the recommendation of their independent consultant (“IC”). The EURCSA specifically places the responsibility for making the ultimate decision on the State Agencies, not the IC. Had the General Assembly intended the State Agencies to be bound by the IC’s recommendation, it would have said so. The fact that the EURCSA does not so provide means that the State Agencies were free to disagree with and depart from those recommendations. Moreover, the EURCSA provides the State Agencies with discretion to approve one or more proposals that result in the greatest long-term system benefits in the most cost effective manner. *Id.*

17. As previously discussed, in crafting the specific evaluation criteria for the bid proposals, the Commission and the Energy Office observed that the State Agencies were not bound by the results of a “straight addition of the numbers” in the IC’s point allocation and had the flexibility to “go outside the bare numbers” if they deemed it appropriate. (Order No. 7066 (October 31, 2006) at ¶ 115). Again, given this specific caveat, CESI’s assertion that the State Agencies must strictly adhere to the IC’s point allocations and rankings cannot withstand scrutiny.⁴

18. Furthermore, Delaware case law firmly establishes that administrative agencies have implicit powers necessary to accomplish legislative intent or policy. *See State v. Worsham*, 638 A.2d 1104, 1107 (Del. 1994) (“It is well-settled Delaware law that ‘the authority granted to an administrative agency should be construed so as to permit the fullest accomplishment of the

⁴ CESI’s argument that the State Agencies’ decision is a departure from prior regulatory practice involving the same utility (Petition at ¶ 48) is equally unavailing. This bidding process is a unique creation of the EURCSA and an issue of first impression for the State Agencies. There was no prior regulatory practice from which to depart.

legislative intent or policy”); *Atlantis I Condo. Ass’n v. Bryson*, 403 A.2d 711, 713 (Del. 1979) (“An expressed legislative grant of power or authority to an administrative agency includes the grant of power to do all that is reasonably necessary to execute that power or authority”); *Retail Liquors Dealers Ass’n of Del. v. Del. Alcoholic Bev. Control Comm’n*, 1980 WL 273545, at *3 (Del. Ch. Apr. 23, 1980), *appeal dismissed*, 424 A.2d 23 (Del. 1980) (“When an agency is vested with a broad range of discretionary powers it is likely that the General Assembly intended to vest implied authority in such agency to do that which is incidental, implied, necessary and proper in light of the objectives sought to be gained and in light of the express powers granted”). The underlying policy of the EURCSA is to effect a comprehensive revision of the Electric Restructuring Act of 1999 to *stabilize electricity prices*. See Synopsis of House Bill 6, *available at <http://www.legis.state.de.us>*. (emphasis added). The State Agencies implicitly have broad authority to implement this policy. Accordingly, they have the authority to deviate from the IC’s rankings to satisfy the underlying policy of the EURCSA.

19. Although the State Agencies did not follow the “straight numbers” of the IC rankings, their decision was consistent with the conclusions and recommendations of the IC. In the Interim Report, the IC concluded:

1. A decision on the bids pursuant to the RFP should await the analysis conducted at the request of the Commission staff that address *the impact on reliability* and system economics if Indian River units 1 and 2 are retired; if substantial issues are presented from this analysis, it should then be determined whether selecting one of the bids pursuant to the RFP is a cost-effective means of addressing the associated risks.
2. Delmarva should be responsible for assessing the need for additional generating capacity on the Delmarva peninsula from a reliability and economic standpoint (based on “bottom up” evaluation and monitoring) and for conducting a risk assessment as part of its IRP obligations. Consistent with the foregoing, the Company should be directed to prepare (and update as needed) a contingency plan to obtain required generation either through a power purchase agreement or through self-build generation as part of its IRP obligation in order to hedge locational capacity and congestion risk. This might entail *installation of a combustion turbine or natural gas-fired combined cycle plant to mitigate*

increases in locational capacity prices and/or congestion at a favorable site, subject to Commission approval.

(Interim Report at 39) (emphasis added). The IC further concluded that all of the bids were non-conforming to the RFP terms and conditions in some respects. (Staff Report at 38; IC Report on Evaluations of Bids (February 21, 2007) at 9-12). The State Agencies' decision sought to fashion an appropriate proposal for Delaware's energy future through negotiation of the non-conforming issues identified by the IC. As noted earlier, CESI conveniently ignores the conclusions of the IC and focuses narrowly on the IC's bid rankings. The State Agencies' decision is consistent with the conclusions of the IC and the underlying intent of the EURCSA.

20. Finally, the State Agencies' decision to deviate from the IC rankings was anything but arbitrary. The State Agencies and Staff have been actively engaged in the bidding process – a novel concept created by the EURCSA – since August 2006.⁵ In reaching their decision, the State Agencies considered volumes of comment from the bidders, Delmarva, the Division of the Public Advocate (“the DPA”), and the public. In assessing the risk of relying on the current energy market, the State Agencies considered the research of several leading energy groups and consultants, including the Governor's Cabinet Committee on Energy, advocating a portfolio approach to supply procurement. (Order at ¶ 22; Staff Report at 51-55). They considered the experiences of other jurisdictions such as California in concluding that Delaware must take control of its own energy future. (Order at ¶ 52). They observed the growing uncertainties with respect to price in the current energy market, including the recent estimated 1227% increase in capacity costs from PJM, the uncertainty regarding transmission, the uncertainty regarding possible retirement of existing generation, the *volatility of natural gas*

⁵ As one Commissioner stated at the May 8, 2007 deliberations, the State Agencies “agonized” over the generation proposal decision. (5/8/07 Tr. at 1771).

prices, and the uncertainty surrounding the cost of carbon. (Order at ¶ 55) (emphasis added).

The IC did not place much emphasis on these considerations, but the State Agencies did. The State Agencies' conclusion was based on substantial evidence, is demonstrably reasonable, and best captures the underlying intent of the EURCSA. CESI's contention to the contrary should be rejected.

III. THE STATE AGENCIES' DECISION TO DIRECT DELMARVA TO NEGOTIATE WITH BOTH CESI AND NRG FOR BACKUP GENERATION IN SOUTHERN DELAWARE DID NOT VIOLATE DUE PROCESS AND WAS SUPPORTED BY AMPLE EVIDENCE.

21. CESI argues that the State Agencies rejected the Hay Road CCGT as a potential source of backup generation without any competent evidentiary support. (Petition at 66). Specifically, CESI contends that the decision to include NRG in the backup generation negotiations was based upon evidence that was neither sponsored by a sworn witness nor subject to scrutiny by the participants.⁶ (*Id.*) In support of this contention, CESI argues that due process considerations require that any testimony considered in reaching an administrative decision should have been sworn and subject to cross-examination. (*Id.* at ¶ 45-46).

22. As an initial matter, CESI's complaint that the State Agencies "rejected" its Hay Road CCGT proposal as a source of backup power is misleading. Although the State Agencies declined to direct Delmarva to negotiate *exclusively* with CESI, it did not preclude CESI from sitting at the negotiating table. The State Agencies' decision does not preclude CESI from

⁶ CESI's contention that the PowerWorld Report was not subject to participant scrutiny is misleading. Prior to the May 8, 2007 deliberations, Delmarva filed comments regarding the accuracy of the PowerWorld Report. (*See* May 4, 2007 Letter in Response to PowerWorld Report). Moreover, its contention that the PowerWorld Report is only understood by technical experts is unavailing. The State Agencies have the experience and expertise to analyze information regarding system reliability.

establishing a generation facility in southern Delaware or demonstrating that its Hay Road site meets reliability requirements. At the May 8, 2007 deliberations, CESI stated on the record that it was not opposed to negotiating with Delmarva regarding siting the proposed CCGT at a different location. (Order at ¶ 39; 5/8/07 Tr. 1698).

23. CESI does not – and cannot – demonstrate a colorable deprivation of a property or liberty interest that triggers due process protections. *See, e.g., Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (“[p]rocedural due process imposes constraints on governmental decisions which deprive individuals of ‘liberty’ or ‘property’”); *Kinash v. Callahan*, 129 F.3d 736, 738 (5th Cir. 1997) (denying review of Commissioner’s refusal to reopen final determination on disability benefits because claimant failed to show a colorable constitutional claim). In this competitive bidding process, CESI has no legal right to a contract award for either primary generation or backup generation: under the EURCSA, the State Agencies have the authority to reject *all* of the bids. *See 26 Del. C. § 1007(d)(3)*. As the bidders understood, the RFP, as approved by the State Agencies, was very specific. With the approval of the State Agencies, the RFP provided for the possible rejection of all proposals or a waiver of any formality or technicality in its treatment of the proposals received. The RFP provides:

Any bidder who submits a proposal does so without recourse against Delmarva and New Energy Opportunities, Inc. and its subcontractors for either rejection by Delmarva or the State Agencies or failure of Delmarva to execute an agreement with such bidder.

(RFP at ¶ 1.6).

24. Even if due process is triggered, CESI received all the process due to it. For the past nine months, CESI has had the right to comment on all of the documents submitted to the State Agencies for review, including the Staff Report. Moreover, it has had the opportunity to be heard at many of the public meetings throughout the bidding and evaluation process. The United

States Supreme Court has consistently held that “due process is flexible and calls for such procedural protections as the particular situation demands.” *See, e.g., Mathews*, 424 U.S. at 334 (internal citations omitted). Under Supreme Court jurisprudence:

Identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

E.g., Goldberg v. Kelly, 397 U.S. 254, 263-271 (1970).

25. CESI has no right that is being affected here. CESI’s right to do business as an electric utility will not be affected if it does not prevail in the bidding process. On the other hand, the State Agencies’ interest in the RFP process is considerable. The State Agencies have an interest in upholding the letter and spirit of the EURCSA to provide reliable and reasonably priced energy to Delaware SOS ratepayers. CESI’s requested relief will delay the RFP process and potentially thwart Delaware’s attempt to diversify its energy supply portfolio beyond the regional wholesale market and waste millions of dollars already expended in the process.

26. Further, CESI’s contention that the PowerWorld Report and related PJM discussions do not constitute evidence is unavailing. Delaware courts have repeatedly held that the rules of evidence are not applicable in administrative proceedings. *See, e.g., Munyori v. Division of Long Term Care Residents Protection*, 2005 WL 2158508, at **2-3 (Del. Super. Aug. 25, 2005) (holding that hearsay can provide a basis for the findings of an administrative agency); *White v. Greggo & Ferrara*, 1994 WL 45355, at *4 (Del. Super. Feb. 14, 1994) (“[r]elaxing the rules of evidence in administrative proceedings is not merely expedient, it is

logical. Administrative bodies typically have specialized functions and expertise in the matters over which they have regulatory authority”).

27. Although Delaware courts have held that an administrative agency’s findings must be supported by competent evidence (*see United Water Delaware, Inc. v. Public Serv. Comm’n*, 723 A.2d 1172, 1176 (Del. 1999)), the authority upon which CESI relies is distinguishable: those cases all involved contested administrative proceedings affecting a party’s established interest. In the instant docket, there are no formal parties. The RFP process did not provide for an intervention period, formal service list, or assignment of a hearing examiner to the case. There were no sworn witnesses at any of the numerous public hearings. No witnesses adopted or authenticated under oath any documents posted on the Commission website and considered by the State Agencies. No witnesses were subject to cross-examination during the May 8, 2007 deliberations or any other public hearing. Accordingly, the RFP process is not a contested proceeding contemplated by the Rules and Delaware jurisprudence interpreting the type of evidence required in an administrative proceeding.⁷ Indeed, if CESI’s position were adopted, no record would exist in this docket because not one page of any document considered by the State Agencies was authenticated, presented by sworn testimony, or subject to cross-examination.

IV. THE STATE AGENCIES DID NOT ERR BY PRECLUDING CESI AND NRG FROM COMPETING WITH BLUEWATER FOR THE WIND PROJECT.

28. CESI argues that the State Agencies erred by not allowing NRG and CESI to compete with Bluewater for a wind project in light of the State Agencies’ dedication to

⁷ This reasoning also invalidates CESI’s argument that Staff violated the Rules by engaging in *ex parte* communications with PJM. There are no formal parties in the bidding process, and accordingly, CESI is not a party protected under Rule 12.

flexibility and competition in the bidding process. (Petition at ¶ 59, 63). Accordingly, CESI seeks to postpone the pending negotiations for 60-90 days to allow NRG and CESI to modify their bid proposals to include a wind component. (*Id.* at ¶¶ 73-74).

This argument is a desperate last-minute attempt to stall the current negotiations. First, neither bidder has demonstrated that it has the innovative technology required to develop offshore wind generation. As CESI acknowledges, the RFP was designed under the “big funnel approach” to encourage as many bidders as possible to submit long-term generation proposals. In December 2006, both NRG and CESI had the opportunity to submit a wind proposal pursuant to the terms of the RFP but did not do so. Throughout the entire nine month process, neither CESI nor NRG has even indicated that they were ready, willing, and able to compete with Bluewater for an offshore wind farm.

29. Moreover, the negotiations should go forward without further delay as emphasized by the public, the DPA, Bluewater, and Staff at the May 8, 2007 deliberations. Bluewater warned that delaying the RFP process would (1) hinder Delaware’s attempt to diversify its energy supply portfolio beyond the regional wholesale market; (2) limit the opportunity to address risk within the confines of the EURCSA and deregulation; (2) waste millions of dollars already spent in the process; and (4) prevent an informed decision on the generation bids, which is only possible after negotiation. (Order at ¶ 38; 5/8/07 Tr. at 1695-96). In light of the foregoing, CESI’s veiled attempt to thwart the negotiations to promote its own RFP agenda should be denied.

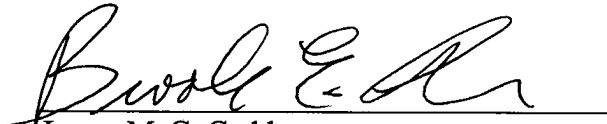
WHEREFORE, for the reasons set forth herein, Staff respectfully requests that the State Agencies:

- (1) Deny CESI’s Petition for Rehearing and Reconsideration and affirm the State Agencies’ May 22, 2007 ruling; and

(2) Grant such other relief as is just and proper.

Respectfully submitted,

ASHBY & GEDDES

A handwritten signature in cursive script, appearing to read "Brooke E. Leach", written over a horizontal line.

James McC. Geddes

Brooke E. Leach

500 Delaware Avenue, 8th Floor

P.O. Box 1150

Wilmington, DE 19899

(302) 654-1888 (telephone)

(302) 654-2067 (facsimile)

Dated: June 18, 2007

181454.1